Supreme Court, U.S.
FILED
SEP 6 1996
CLERK

No. 96-238

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RICHARD K. EHRLICH, as Trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965, Trust,

Petitioner,

v.

CITY OF CULVER CITY, CITY COUNCIL OF THE CITY OF CULVER CITY, STEVEN GOURLEY, JOZELLE SMITH, JAMES BOULGARIDES, AND PAUL A. JACOBS,

Respondents.

Petition For Writ Of Certiorari To The California Supreme Court

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Mary V. DiCrescenzo
The National Association of Home Builders
1201 15th Street
Washington, D.C. 20005
(202) 822-0359

Kenneth B. Bley*
Cox, Castle & Nicholson, LLP
2049 Century Park East
Suite 2800
Los Angeles, CA 90067
(310) 284-2231

Attorneys for *Amicus Curiae* THE NATIONAL ASSOCIATION OF HOME BUILDERS

*Counsel of Record

TABLE OF CONTENTS

		Page
I.	THE NAHB'S INTEREST ARISES FROM ITS MEMBERS' CONCERNS AS TO WHEN THEY CAN BE REQUIRED TO DEDICATE LAND OR PAY MONEY TO A LOCAL GOVERNMENT AS A CONDITION OF A LAND USE APPROVAL	1
II.	SUMMARY OF THE ARGUMENT	2
	ARGUMENT	
III.	THE PETITION FOR WRIT OF CERTIORARI PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE COURT	3
	A. The Use And Regulation Of Land Present Important Questions Of Law	3
	B. The Extent Of Governmental Power To Require Exactions In The Land Use Context Is Of Vital Importance To Landowners	4
	C. *Dolan* Solved Only One Part Of The Puzzle	6
	D. The State Courts Are Already In Massive Disagreement As To The Extent Of *Dolan*	7
IV.	CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page(s)
Agins v. City of Tiburon, 447 U.S. 255 (1980)	1
Amoco Oil Co. v. Village of Schaumburg, 277 Ill.App.3d 926, 661 N.E.2d 380 (1995), app. denied, 167 Ill.2d 549, 667 N.E.2d 1055 (1996)	9
Clark v. City of Albany, 137 Or.App. 293, 904 P.2d 185 (1995), rev. denied, 322 Or. 644, 912 P.2d 375 (1996)	8
Dolan v. City of Tigard, - U.S. -, 114 S.Ct. 2309 (1994)	2-4, 6-10
Ehrlich v. City of Culver City, 12 Cal.4th 854, 50 Cal.Rptr.2d 242, 911 P.2d 429 (1996)	8, 9
First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987)	4
Garneau v. City of Seattle, 897 F.Supp. 1318 (W.D. Wash. 1995)	8
J.C. Reeves v. Clackamas County, 135 Or.App. 615, 887 P.2d 360 (1994)	8, 9
Kaiser Aetna v. United States, 444 U.S. 164 (1979)	4
Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419 (1982)	4
Loyola Marymount University v. Los Angeles Unified School District, 45 Cal.App.4th 1256, 53 Cal.Rptr.2d 424 (1996)	9
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)	4

	Page(s)
MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986)	1
McCarthy v. City of Leawood, 257 Kan. 566, 894 P.2d 836 (1995)	8
Nectow v. City of Cambridge, 277 U.S. 183 (1928)	4
Nollan v. California Coastal Commission, 483 U.S. 825 (1987)	1, 4
Parking Association of Georgia, Inc. v. City of Atlanta, - U.S. -, 115 S.Ct. 2268 (1995)	7
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)	3
River Park, Inc. v. City of River Park, 23 F.3d 164 (7th Cir. 1994)	8
San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981)	1
San Mateo Coastal Landowners' Association v. County of San Mateo, 38 Cal.App.4th 523, 45 Cal.Rptr.2d 117 (1995)	9
Schultz v. City of Grants Pass, 131 Or.App. 220, 884 P.2d 569 (1994)	9
Southeast Cass Water Resource District v. Burlington Northern RR, 527 N.W.2d 884 (N.D. 1995)	9
State of Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928)	4
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)	8
Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	3

Page(s)

Waters Landing Limited Partnership v. Montgomery County, 337 Md. 15, 650 A.2d 712 (1994) 8, 9

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) 1

TREATISES

Abbott, Moe & Hanson, Public Needs & Private Dollars (1993) 4

Alterman, Evaluating Linkage, and Beyond: The New Method for Supply of Affordable Housing and Its Impacts (1989) 5

Altshuler & Gómez-Ibáñez, Regulation for Revenue: The Political Economy of Land Use Exactions (1993) 5

4 Anderson, American Law of Zoning, Ch. 25, Subdivision Controls (3d ed. 1986 and Dec. 1995 Cum. Supp.) 4

Frank & Rhodes (eds), Development Exactions (1987) 5

Kushner, Subdivision Law & Growth Management, Ch.6, Financing Capital Improvements (1996) 4

Mandelker, Cunningham & Payne, Planning and Control of Land Development 600-601 (4th ed. 1995) 5

Miles, Haney & Berens, Real Estate Development: Principles and Process 35 (1996) 7

Nicholas, Nelson & Juergensmeyer, A Practitioner's Guide to Development Impact Fees (1991) 5

	Page(s)
"Not In My Backyard": Removing Barriers to Affordable Housing 2-10-12 (1991)	5
Symposium, Exactions: A Controversial New Source for Municipal Funds, 50 Law & Contemp. Prob. 1 (1987)	5
Synder & Stegman, Paying for General Growth: Using Development Fees to Finance Infrastructure (1986)	5
U.S. Department of Commerce, Construction Review Quarterly Industry Report, Table 2 (Fall and Winter 1995-96)	7
5 Williams, American Planning Law, Chs. 156, Subdivision Control, and 156A, Impact Fees (1988 rev. and Aug. 1995 Cum. Supp.)	4
5 Ziegler, Rathkopf's The Law Of Zoning & Planning, § 65.04, Development Conditions, Improvements, Exactions, and Impact Fees (1996)	4

THE NATIONAL ASSOCIATION OF HOME BUILDERS ("NAHB") has received the parties' written consent to file this brief as amicus curiae in support of the petition for writ of certiorari and have filed the letters of consent with the Clerk of the Court.

I.

THE NAHB'S INTEREST ARISES FROM ITS MEMBERS' CONCERNS AS TO WHEN THEY CAN BE REQUIRED TO DEDICATE LAND OR PAY MONEY TO A LOCAL GOVERNMENT AS A CONDITION OF A LAND USE APPROVAL

The NAHB represents over 185,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes but also apartment, condominium, commercial, and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with any judicial decision that deals with the circumstances under which a landowner may be forced to dedicate land, pay money, or provide services as a condition of a land use approval. More specifically, its members need to know, in advance, what costs they are likely to incur as part of the land development process.

The NAHB has been before the Court as an amicus curiae or as "of counsel" to the property owners in a number of cases involving the rights of landowners to use their property and the remedy to be applied when those rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Nollan v. California Coastal Commission*,

483 U.S. 825 (1987),[1] and *Dolan v. City of Tigard*, - U.S. -, 114 S.Ct. 2309 (1994).

The NAHB submits its amicus curiae brief in support of the petitioner in the present case in order to assist the Court in determining whether to grant its writ of certiorari to clarify the circumstance under which the heightened scrutiny demanded by *Dolan* applies; i.e., when is a municipality required to make an individualized determination of whether rough proportionality exists between the exactions demanded as a condition of the approval of new development and the impacts created by the new development. Its determination is particularly necessary at the present time because of the importance of the issue presented and the current uncertainty resulting from the differing views of the applicability of *Dolan* amongst state courts.

II.

SUMMARY OF THE ARGUMENT

Dolan held that a municipality bears the burden of demonstrating, through an individualized determination, that a rough proportionality exists before an exaction requiring the dedication of land and the impacts created by new development can be upheld when the exaction has been made a condition of an adjudicative land use approval. *Dolan* did not address the issue of whether a municipality bears a similar obligation — and courts are to subject a municipality's actions to a higher level of scrutiny — when an exaction is imposed as a condition in an adjudicative context but does not involve the dedication of land, i.e., when it involves the payment of money or the provision of services, nor did it address the question of what happens when the exaction is imposed legislatively to a whole class of approvals.

---

[1] The Court's opinion cited the NAHB's brief. 483 U.S. at 840.

State courts handle the bulk of land use cases but they haven't a clue as to what they are supposed to do when presented with an exaction condition in circumstances that are not on all fours with *Dolan*. As a result, their decisions are all over the place. Some state courts have limited *Dolan* to its facts; others have extended it.

Dolan answered only one portion of the important federal constitutional question of when government is entitled to force a landowner to provide private property to the public in the land use approval context. Although only two years old, *Dolan* has already formed the rule of decision for numerous cases but without any uniform understanding by the state courts of when the heightened scrutiny required by *Dolan* applies. Costs, once known, can be dealt with; uncertainty is a killer. Only the Court's explanation of what it intended in *Dolan* will provide the certainty that lower courts and landowners need and deserve. That is why the court should grant the petition for certiorari now pending.

ARGUMENT

III.

THE PETITION FOR WRIT OF CERTIORARI PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE COURT.

A. The Use And Regulation Of Land Present Important Questions Of Law.

The petition now pending before the Court should be granted because it presents a federal constitutional issue having to do with how far government can go when it regulates private property, an issue of great importance that has been frequently worthy of the Court's expenditure of its limited time and resources in the past. See, e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), *Village*

of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The petition involves the specific issue of under what circumstances government can demand that private property be provided to the public as part of the land use approval process — an important subset of the more general issue of the limits of the governmental right to regulate the use of land. The public's desire for access to private property, even for the worthiest of reasons, is not enough to justify a demand that a landowner make his or her property available to the public. See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419 (1982), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, - U.S. -, 114 S.Ct. 2309 (1994). This follows, of course, from the fact that the Takings Cause of the Fifth Amendment is entitled to as much respect as the other parts of the Bill of Rights. *Dolan*, supra, 114 S.Ct. at 2320.

B. The Extent Of Governmental Power To Require Exactions In The Land Use Context Is Of Vital Importance To Landowners.

The literature on exactions in the land use context is voluminous[2] because the subject of exactions in the land use

---

[2] See, e.g., 4 Anderson, American Law of Zoning, Ch. 25, Subdivision Controls (3d ed. 1986 and Dec. 1995 Cum. Supp.); Kushner, Subdivision Law & Growth Management, Ch. 6, Financing Capital Improvements (1996); 5 Williams, American Planning Law, Chs. 156, Subdivision Control, and 156A, Impact Fees (1988 rev. and Aug. 1995 Cum. Supp.); 5 Ziegler, Rathkopf's The Law Of Zoning & Planning, § 65.04, Development Conditions, Improvements, Exactions, and Impact Fees (1996); Abbott, Moe & Hanson, Public Needs & Private

(footnote continues)

context is important. Economists may argue as to who ultimately bears the costs of the exactions — see Mandelker, Cunningham & Payne, Planning and Control of Land Development 600-601 (4th ed. 1995) — but nobody contests the fact that those costs exist. Exactions go to the developer's bottom line and the developer's ability to make a profit. No profits, no development. No development, no new homes, office buildings, stores, or factories.

Nor does anyone contest the reason why exactions have become even more important than they were in the past: government, at every level, simply does not have enough money to do all of the things that the public wants done and people are not eager to tax themselves to provide all of the things which society requires. "Not In My Backyard": Removing Barriers to Affordable Housing 2-10-12 (1991). The result is predictable: the burdens of society are shifted to a small group — landowners who need land use approvals — thus sparing the majority from having to assign priorities to various needs.

Given that needs exist and resources are limited, the question becomes one of when (not if) developers can be required to solve public problems with private funds and, when exactions can be imposed, how large the resulting costs are going to be.

Landowners and developers are rational economic beings. They can deal with exactions, even large ones, if they

---

(footnote continued)

Dollars (1993); Altshuler & Gómez-Ibáñez, Regulation for Revenue: The Political Economy of Land Use Exactions (1993); Nicholas, Nelson & Juergensmeyer, A Practitioner's Guide to Development Impact Fees (1991); Alterman, Evaluating Linkage and Beyond: The New Method for Supply of Affordable Housing and Its Impacts (1989); Frank & Rhodes (eds), Development Exactions (1987); Symposium, Exactions: A Controversial New Source for Municipal Funds, 50 Law & Contemp. Prob. 1 (1987); and Synder & Stegman, Paying for General Growth: Using Development Fees to Finance Infrastructure (1986).

know what to expect. Reasonable business decisions can be made when costs are fairly well known. However, no business person can make plans and projections which hope to bear any relationship to reality when there is no predictability and costs are a sometime thing. Predictability of outcome — even an adverse outcome — is better than uncertainty for all concerned. Without that predictability, decisions cannot be made or, if made, there is an increased chance that they will be made poorly, resulting in wasted or underutilized resources.

The only way that predictability can be restored on a nationwide basis is for the Court to grant the petition and tell the business and legal world what *Dolan* really means.

C. *Dolan* Solved Only One Part Of The Puzzle.

In *Dolan*, the City of Tigard imposed a condition which required the landowner, Mrs. Dolan, to dedicate a portion of her property to the public for flood control and traffic improvements. (114 S.Ct. at 2312.) The Court refused to allow Mrs. Dolan to be deprived of her land based only on an attenuated relationship between impact and mitigation. Instead, the Court held that the City was required to demonstrate, through an individualized determination, that a rough proportionality existed between the impact of Mrs. Dolan's expanded hardware store and the mitigation — land to be deeded to the public — which the City had imposed as a condition of the approval of that expansion. (114 S.Ct. at 2319-2320.)

In other words, *Dolan* provided a rule of decision in a case where a condition imposed on an ad hoc basis required the dedication of land; it said nothing as to what the rule of decision would be had the City required the payment of fees or the provision of services nor did it address the question of what the rule of decision would be had the dedication requirement been imposed by means of a legislatively

adopted requirement — one that would have been imposed generally in a particular class of land use approvals.

As shown in the next subsection, state courts around the nation have been unable to come to a common conclusion as to when *Dolan's* heightened scrutiny applies. Uncertainty reigns supreme and will continue to do so until the Court speaks and tells the business and legal world what *Dolan* really means.

D. The State Courts Are Already In Massive Disagreement As To The Extent Of *Dolan*.

Dolan was an important case because land development is an important component of the national economy.[3] Courts have had to deal with its importance; a Westlaw search shows that, in the two years since *Dolan* was handed down, it has been cited over 40 times by federal courts and over 65 times by state courts. The same search also showed that *Dolan* has been cited in more than 340 law review articles demonstrating its importance to commentators. As might be expected with so many citations, different readers of the case have come to different conclusions.

In particular, the state courts have no idea as to whether *Dolan's* heightened scrutiny is to be applied to exactions which do not require the dedication of land or which have been imposed legislatively.[4]

---

[3] Just under 50% of annual domestic private investment is in real estate. Miles, Haney & Berens, Real Estate Development: Principles and Process 35 (1996). The value of new residential, commercial and industrial construction is estimated to be in excess of $250 billion for 1996. U.S. Department of Commerce, Construction Review Quarterly Industry Report, Table 2 (Fall and Winter 1995-96). Real estate, as an industry, employs approximately 1.3 million workers; another 4.6 million workers are employed in construction. Miles, Haney & Berens, supra.

[4] There is an additional question of whether *Dolan* applies when a land use regulation does not involve an exaction. See, e.g., *Parking*

(footnote continues)

No lower court has had any problem dealing with a case where a condition imposed as part of an adjudicative decision required the dedication of land. That is, however, where the agreement ends.

Does *Dolan* apply when an exaction involves something other than land? Some courts say yes, others no.

The case for which a writ of certiorari is being sought held that it applies to money. *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 859, 50 Cal.Rptr.2d 242, 246, 911 P.2d 429, 433 (1996). *Clark v. City of Albany*, 137 Or.App. 293, 299, 904 P.2d 185, 189 (1995), rev. denied, 322 Or. 644, 912 P.2d 375 (1996), *J.C. Reeves v. Clackamas County*, 135 Or.App. 615, 623, 887 P.2d 360, 365 (1994), both held that the heightened scrutiny required by *Dolan* applied when a developer was required to improve adjacent public streets.

On the other hand, *McCarthy v. City of Leawood*, 257 Kan. 566, 579, 894 P.2d 836, 845 (1995), and *Waters Landing Limited Partnership v. Montgomery County*, 337 Md. 15, 39, 650 A.2d 712, 724 (1994), held that the heightened scrutiny required by *Dolan* did *not* apply where the exaction required the payment of money.[5]

(footnote continued)

Association of Georgia, Inc. v. City of Atlanta, - U.S. -, 115 S. Ct. 2268 (1995) (Thomas, J., dissenting). In as much as the petition now pending before the Court involves an exaction, nothing more will be said about non-exaction situations.

[5] Most land use cases are brought in state courts because of the desire of federal courts to avoid acting as super boards of zoning appeals. See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting); *River Park, Inc. v. City of River Park*, 23 F.3d 164, 165 (7th Cir. 1994); and *Studen v. Beebe*, 588 F.2d 560, 562 (6th Cir. 1978). Even so, at least one lower federal court has already held that *Dolan* is inapplicable where the exaction consists of money. *Garneau v. City of Seattle*, 897 F.Supp. 1318, 1325 (W.D. Wash. 1995). It is probably fair to say that other lower federal courts will have to deal with the extent of *Dolan* in the near future.

State courts are also split as to whether an exaction imposed as the result of a legislatively adopted rule of general application is governed by *Dolan's* requirement of heightened scrutiny. *Amoco Oil Co. v. Village of Schaumburg*, 277 Ill.App.3d 926, 939, 661 N.E.2d 380, 389-390 (1995), app. denied, 167 Ill.2d 549, 667 N.E.2d 1055 (1996), *J.C. Reeves Corp.*, supra, 131 Or.App. at 623, 887 P.2d at 365, and *Schultz v. City of Grants Pass*, 131 Or.App. 220, 226-227, 884 P.2d 569, 572-573 (1994), all held that *Dolan* applies when the exaction is imposed through a legislative enactment. Further, Justice Mosk, in his concurring opinion in *Ehrlich*, argued that "even generally applicable laws which authorize the physical occupation of the property are takings . . ." (12 Cal.4th at 901, n.4, 50 Cal.Rptr.2d at 249, n.4, 911 P.2d at 460, n.4)

On the other hand, the majority in *Ehrlich* stated that legislatively imposed exactions would not be subject to *Dolan's* heightened level of scrutiny. (12 Cal.4th at 876, 50 Cal.Rptr.2d at 257, 911 P.2d at 443-444.) This is the same position taken in *Loyola Marymount University v. Los Angeles Unified School District*, 45 Cal.App.4th 1256, 1271, 53 Cal.Rptr.2d 424, 435 (1996), *San Mateo Coastal Landowners' Association v. County of San Mateo*, 38 Cal.App.4th 523, 548-549, 45 Cal.Rptr. 2d 117, 131-132 (1995), *Southeast Cass Water Resource District v. Burlington Northern RR*, 527 N.W.2d 884, 896 (N.D. 1995), and *Waters Landing*, supra, 337 Md. at 39, 650 A.2d at 724.

State courts of last resort and lower state appellate courts are all wrestling with what the Court meant in *Dolan*. In the two years since the Court handed down its decision in *Dolan*, courts of last resort all over the country have come to diametrically different results based on widely differing understandings of its reach. The situation is not likely to get any better — and the uncertainty is not likely to be reduced — in the near future unless the Court grants the

petition and tells the business and legal world what *Dolan* really means.

IV.

CONCLUSION

The Court's decision in *Dolan* was of constitutional magnitude; its application should be uniform throughout the United States regardless of whether a case is brought in a federal or a state court. The courts today are like the proverbial team of blind men trying to describe an elephant. The differences in the interpretation of *Dolan's* reach means that the result in a particular case which goes anywhere beyond the dedication of land in an adjudicative context is a function of where the land is located and the case is brought. That is no way to implement a rule of constitutional dimensions.

In some courts, the heightened scrutiny required by *Dolan* will apply even though the exaction consists of money or services; in others, it will apply only if the exaction consists of the dedication of land. In some courts, the heightened scrutiny required by *Dolan* will apply even though the exaction has been imposed at a legislative level. In others, it will apply only if the exaction is imposed on an ad hoc basis.

Rarely has a decision by this Court received so many different interpretations by so many in such a short time. All of those involved with the process — the staffs of the municipalities who are going to have to decide what exactions can legitimately be imposed, the landowners who are going to have to satisfy those exactions, the lawyers who are going to have to advise both the municipalities and the landowners, and the judges who are going to have to decide the validity of the exactions — need and deserve the Court's guidance as to what circumstances invoke *Dolan's* heightened scrutiny. The uncertainty must, and can be, resolved by granting Mr. Ehrlich's petition for writ of certiorari.

Accordingly, the NAHB respectfully requests that the Court grant Mr. Ehrlich's petition.

Respectfully submitted,

KENNETH B. BLEY*
COX, CASTLE & NICHOLSON, LLP

MARY V. DICRESCENZO

Attorneys for *Amicus Curiae*
THE NATIONAL ASSOCIATION
OF HOME BUILDERS

***Counsel of Record**